AUSTRALIAN ENERGY REGULATOR

NATIONAL ENERGY RETAIL LAW: ANNUAL COMPLIANCE REPORT 2012–13

November 2013




Contents

1 Introduction

The Australian Energy Regulator (AER) is Australia's national energy market regulator. We administer a range of laws that regulate gas and electricity markets in Australian states and territories.

The National Energy Retail Law, the National Energy Retail Rules and the National Energy Retail Regulations together comprise the National Energy Customer Framework. The Customer Framework has a focus on consumer interests, and consumer protections, in retail gas and electricity markets. Energy businesses—retailers and distributors—must meet a number of legal obligations under the Retail Law and Rules, and the AER has a role to make sure that those businesses comply with their obligations.

Part of the AER's role is also to report on compliance under the Retail Law and Rules, and this is the first annual report from the AER on these issues, covering 1 July 2012 to 30 June 2013. This report explains the AER's approach to ensuring compliance with the Retail Law, and reports on the specific compliance and enforcement activities we have undertaken throughout 2012–13. The report also identifies compliance issues we have observed, and outlines the steps we are taking now and into the future to address them.

What is the AER's objective for Retail Law compliance?

A key objective for us is to build consumer confidence in energy markets. We recognise that energy markets pose challenges for consumers, given the complexity of the retail energy contracts on offer, and that consumers should feel confident to engage with the retail energy market in a way that best suits their needs.

Part of doing this is seeking to ensure that consumers receive the full benefit of the protections provided by the Retail Law and Rules. This means ensuring that energy retailers and distributors comply with their legal obligations.

How does the AER undertake its role?

The AER engages in a range of activities to ensure compliance with the Retail Law and Rules.

We use a variety of monitoring and information gathering methods to identify conduct that may be non-compliant. This includes information that energy companies submit to us, as well as information we obtain proactively through targeted reviews.

In 2012–13, we received information from energy companies via our exception reporting arrangements. Under this framework, energy companies must report to the AER when it appears they may have breached a legal obligation. We also undertook reviews of the information published on energy companies' websites, and conducted a targeted review of retailers' billing practices.

Where possible breaches of the Retail Law or Rules are identified through our monitoring activities, we undertake enquiries and investigate further to see what further action is required. If it appears that a breach has occurred, we have a range of options to enforce compliance with the law.

In 2012–13, we undertook a range of investigations and pursued enforcement action for breaches of obligations relating to customers with life support equipment. We also contributed to the Australian Competition and Consumer Commission's campaign against unlawful door-to-door marketing by energy companies.

Part of our compliance work is also to inform and educate our key stakeholders about our activities and our expectations around compliance with the Retail Law and Rules. In 2012–13 we have published material that explains our approach to compliance and our interim observations following six months of the Retail Law being in operation. We have also liaised directly with energy companies and other stakeholders, such as ombudsman schemes and jurisdictional regulators, in relation to the obligations under the Retail Law and Rules.

What compliance issues have we observed?

The year from 1 July 2012 to 30 June 2013 was the first year in which the Retail Law and Rules were in operation. The Retail Law and Rules were progressively implemented by states and territories during the 12 months to 30 June 2013. The Retail Law and Rules commenced on 1 July 2012 in the Australian

Capital Territory and Tasmania (where they apply for electricity only), and on 1 February 2013 in South Australia. New South Wales adopted the framework on 1 July 2013, while Victoria and Queensland are expected to adopt the framework in the future. These factors qualify any conclusions about levels of compliance, as conduct has been observed in smaller jurisdictions and may not be representative of the overall picture.

In some areas of the Retail Law levels of compliance appear to have been good, with retailers and distributors willing to address concerns when raised by us. In other areas there is cause for concern and a need for greater attention by businesses:

- We have observed recurring issues in relation to the life support obligations in the Retail Rules, and the provisions around disconnection of customers and the management of planned interruptions to energy supply.
- Amongst retailers specifically, issues have centred around the quality of information available to consumers, with billing practices (sending timely and accurate bills, and conducting meter reads every 12 months) an area of particular concern.

We have followed up issues through correspondence, meetings and formal investigations. In most cases, the matter was resolved by the energy company immediately addressing shortcomings. In other cases we took enforcement action. Some issues are under continuing investigation. Our observations on compliance during 2012–13 are also refining how we undertake our compliance and enforcement activities in 2013–14, including the areas we should focus on.

What is coming up?

In 2013–14, we are continuing our compliance and enforcement activities to monitor and gather information, investigate potential breaches of the Retail Law and Rules, take enforcement action and disseminate information. Our work program for 2013–14 will continue to include many of the activities we have undertaken for the 2012–13 year, but informed by the experience we have gained during the first year of operation of the Retail Law and Rules.

More specifically, we will soon be releasing the findings of our review of small customer billing arrangements. This review has examined retailer practices around billing, including the basis for bill calculations, the frequency and content of bills, under and over charging, and how billing errors are addressed. We will also commence our review of retailer hardship policies, which will examine the implementation and administration of those polices by retailers. During the coming year we will also be reviewing many of the guidelines we have published under the Retail Law, and consulting on our approach to the licensing of alternative energy sellers. We are also exploring ways to report more regularly on compliance issues we have observed, and to communicate the particular issues we are focussing on.

What is in this Report?

In states and territories where the Retail Law has commenced, the AER is required to report annually on its compliance activities.[1] The AER's report must cover a 12 month period up to 30 June.[2] We must report on:

- our monitoring activities under the Retail Law
- the extent to which regulated entities have complied, or failed to comply, with their obligations under the Retail Law, Rules and Regulations
- the compliance by retailers (and associates of retailers) with their obligations relating to energy marketing activities, and
- any additional matters we consider appropriate to include.[3]

This report covers the period from 1 July 2012 to 30 June 2013. Consequently, it deals only with the jurisdictions that adopted the Retail Law and Rules within that period: the ACT, Tasmania and South Australia. In the sections that follow, we discuss:

- the Retail Law and our role under it
- the compliance and enforcement activities we have undertaken in 2012–13
- the compliance issues we have observed in 2012–13, and
- our continuing and upcoming activities for 2013–14.

1 National Energy Retail Law (NERL), s. 279(1).

2 NERL, s. 279(1).

3 NERL, s. 280. The AER also monitors the wholesale electricity and gas markets and is responsible for compliance monitoring, investigations and enforcement under the National Electricity Law and Rules, and the National Gas Law and Rules. These activities are not reported in this publication, but further information is available on the AER's website (www.aer.gov.au).

Box 1: Key points

- Building consumer confidence in retail gas and electricity markets is a key objective for the AER. Part of achieving this goal is ensuring that energy retailers and distributors comply with their legal obligations, and that consumers obtain the full benefit of the National Energy Retail Law.
- We undertake a range of activities to ensure compliance, including information gathering and compliance monitoring, investigations and enforcement action where a breach of the Law occurs, and dissemination of information to inform and educate stakeholders.
- In 2012–13, we:
  - received information from energy companies via our exception reporting arrangements, and followed up a number of matters with further investigation
  - undertook reviews of the information published on energy companies' websites
  - conducted a targeted review of how retailers go about billing small customers, which included looking at retailer practices around the frequency and content of bills, under and over charging, and how billing errors are addressed
  - investigated possible breaches and took enforcement action for non-compliance with laws about customers with life support equipment
  - worked with the Australian Competition and Consumer Commission to target unlawful door-to-door marketing by energy companies, and
  - published material and informed stakeholders about our approach to compliance, and liaised directly with energy companies, ombudsman schemes and jurisdictional regulators about the Retail Law and Rules.
- In relation to levels of compliance:
  - In some areas of the Retail Law levels of compliance have been good, with retailers and distributors willing to address concerns when raised by us.
  - In other areas there may be more cause for concern. There are recurring issues in relation to life support obligations, and the provisions around disconnection of customers and the management of planned interruptions to energy supply.
  - Amongst retailers specifically, issues have centred around the quality of information available to consumers, including what is published on retailer websites and in customer bills.
  - For each issue identified, we followed up with the energy companies involved. This included correspondence and meetings, and more formal investigations, to address the issues identified. In relation to the life support obligations, this included issuing infringement notices for non-compliance in certain cases.
  - We have projects and investigations on foot to continue to ensure compliance with the Retail Law and Rules.
- Into 2013–14 we will continue our compliance activities to monitor and gather information, investigate potential breaches of the Law, take enforcement action and disseminate information. Our work is informed by the experience we have gained during the first year of operation of the Retail Law.

2 The National Energy Retail Law and the AER

2.1 The National Energy Customer Framework

The National Energy Customer Framework is established by the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules. The Framework focusses on consumer interests in retail energy markets.[4]

Australian states and territories are progressively adopting the Retail Law. It commenced on 1 July 2012 in the Australian Capital Territory and Tasmania (where it applies for electricity only). South Australia adopted the Retail Law on 1 February 2013, and New South Wales adopted it on 1 July 2013. Victoria and Queensland are expected to adopt the Retail Law, while Western Australia is not part of the overall arrangements.

2.2 The role of the AER in ensuring compliance

The AER is Australia's national energy market regulator. It is an independent statutory authority established under the *Competition and Consumer Act 2010* (Cth). The AER administers the Retail Law, Rules and Regulations in the jurisdictions in which they have been adopted.

Energy retailers and distributors must meet a number of legal requirements under the Retail Law and Retail Rules. The Retail Law gives powers and functions to the AER to ensure compliance by energy companies with their obligations. These powers and functions include that the AER:

- monitor and report on compliance with the statutory obligations
- investigate breaches or possible breaches of the obligations, and
- institute and conduct court proceedings where appropriate.

The options the AER can pursue to enforce a suspected breach of the Retail Law or Rules are summarised in Box 2 in section 3.2.1 below, and include court proceedings as well as less formal outcomes. The AER also has a range of powers to assist it in performing its roles. These include the ability to obtain information from people, to conduct audits of energy companies, and to impose reporting requirements on energy companies.

2.3 The AER's approach

The AER has outlined 'strategic priorities' that it will pursue when undertaking its work. In performing our roles under the Retail Law, we are aiming to build consumer confidence in energy markets.[5] This is because we recognise that energy markets pose challenges for consumers, given the complexity of the retail energy contracts on offer. Strengthening consumer confidence means that consumers should be empowered to engage with the retail energy market in a way that best suits their needs.

Part of pursuing this priority is seeking to ensure that consumers receive the full benefit of the protections provided by the Retail Law and Rules. The AER's compliance and enforcement activities go towards achieving this.

The AER has published a 'Statement of Approach', a document which sets out how we conduct our compliance and enforcement activities under the Retail Law. (See the *Statement of Approach: compliance with the National Energy Retail Law, Retail Rules and Retail Regulations* (Version 1, July 2011).[6]) The Statement of Approach explains our approach to monitoring compliance and investigating possible breaches of obligations under the Retail Law or Rules, and how we will determine the appropriate response to identified breaches.

Our approach is primarily to foster a culture of compliance by energy companies.[7] This is because

4 As stated in section 13 of the Retail Law, the objective of the Law is '…to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.'

5 AER, *Strategic Priorities and Work Program 2013–14*, p. 5. Available on the AER website at: http://www.aer.gov.au/node/21203.

6 Available on the AER website at http://www.aer.gov.au/node/16111.

7 AER, *Strategic Priorities and Work Program 2013–14*, p. 10.

effective prevention of breaches is preferable to us taking enforcement action after a breach has occurred. We therefore seek to provide guidance on good industry practice, and to work cooperatively with businesses to promote a culture of compliance.[8] Targeted and timely enforcement action may however be necessary and appropriate in certain circumstances.[9]

The AER has four core compliance activities that are a part of our overall approach: compliance monitoring; investigation of possible breaches; pursuing enforcement action, and information reporting.[10] Each of these has a range of components, which are discussed further in the following sections. In summary though, we conduct regular monitoring of energy companies' compliance with the Retail Law and Rules obligations, and do so via a range of means. Where monitoring identifies an issue, we will make enquiries and investigate further to determine whether a matter may require further action. The Retail Law provides a range of enforcement options for where a breach has occurred, and we will select the option best suited to the relevant circumstances. We also report on our compliance activities to build awareness amongst energy companies and to educate consumers.

The following sections describe the specific activities we have undertaken throughout 2012–13, and the outcomes we have seen. The following sections also explain in more detail how we go about our activities, including the processes we follow and the factors we take into account when deciding on a course of action.

8 AER, *Strategic Priorities and Work Program 2013–14*, p. 25.

9 AER, *Strategic Priorities and Work Program 2013–14*, p. 25.

10 AER, *Statement of Approach*, p. 4.

3 Report on the AER's activities for 2012–13

This section of the report describes the AER's compliance and enforcement activities under the Retail Law and Rules for the 12 month period up to 30 June 2013.

Our activities occur under three broad groupings: compliance monitoring; investigations and enforcement, and information reporting. We have conducted a range of work, and the following sections discuss our specific activities as well as the way we go about our compliance and enforcement work.

3.1 Compliance monitoring

The AER uses a range of monitoring and information gathering methods to identify conduct that may be non-compliant with the Retail Law and Rules. These include:

- retailer and distributor reporting to the AER, including under our 'exception reporting framework'
- targeted reviews of publicly available information, such as information on energy companies' websites, and
- targeted compliance reviews to examine compliance with particular obligations or groups of obligations.

Where these methods identify conduct that may be in breach of the legal requirements, we will raise the matter with the relevant business for rectification, or escalate it for further investigation or action. These activities also serve to improve stakeholder understanding of the Retail Law and Rules.

3.1.1 Exception reporting

The AER has established an exception reporting framework, under which energy companies subject to the Retail Law must report to the AER when there is a suspected breach of a legislative obligation. Administration of this regime forms a large part of the AER's compliance work.

The framework is set up by the *Compliance Procedures and Guidelines: National Energy Retail Law, Retail Rules and Retail Regulations* (Version 2, June 2012; see further below).[11] The Guidelines require applicable energy companies to submit information to the AER regarding their compliance with the Retail Law, Rules and Regulations. The Guidelines apply to both energy distributors and retailers, for both electricity and gas, in the jurisdictions within which the Retail Law has commenced.

Under the exception reporting framework, obligations in the Retail Law and Rules are categorised into three types, any suspected breaches of which must be reported within a specified timeframe. The three types are:

- 'Type 1' obligations, which include obligations relating to life support equipment, de-energisation of small customers, and obligations to provide small customers with access to energy retail and connection services. Given the potential harm to consumers that may arise from a breach of these obligations, a suspected breach must be reported within 24 hours of its identification.
- 'Type 2' obligations, which include obligations relating to energy marketing, pre-contractual procedures, billing and customer hardship. Suspected breaches of these obligations must be reported every six months.
- 'Type 3' obligations, which include customer classification, consumption threshold matters, requests for de-energisation and distributor interruptions to supply. Suspected breaches of these obligations must be reported annually.

Regulated businesses are also required to submit consolidated annual reports to the AER by 31 August each year. These annual reports set out all suspected type 1, 2 and 3 breaches that a business has identified throughout the year. The AER assesses the information provided in these reports and determines an appropriate response. This is discussed further below in the section on 'Investigations'.

The AER now has over 12 months' experience in the administration of the exception reporting framework. It is usefully providing us with relevant information to monitor and assess the level of compliance by regulated entities. We also recognise that there may be scope for refinements to the exception reporting framework to ensure that it continues to deliver useful information, and to encourage compliance by the regulated entities. The AER is considering adjustments to the framework that may be trialled in the near future.

11 Available on the AER website at http://www.aer.gov.au/node/1267.

3.1.2 Website reviews

We monitor the information published on the websites of retailers and distributors. The Retail Law and Rules require retailers and distributors to publish certain information and documents on their websites so that it is readily available to customers. Additional requirements apply to the manner and form of publication, and there are also obligations around minimum or mandatory content. The availability of information to consumers about energy products, and the availability of information that is accurate and accessible, contribute to assisting consumers to participate effectively in retail energy markets.

We conducted a number of website reviews in 2012–13. We reviewed the websites of all retailers and distributors operating in the ACT and Tasmania throughout the second half of 2012, following the commencement of the Retail Law and Rules in those jurisdictions. The review looked at whether retailers and distributors were meeting obligations both to publish certain information, and to publish the information in the required manner and form. Areas covered included obligations relating to the publication and content of energy price factsheets, standard and market retail contracts, connection offers and contracts, retailers' customer hardship policies, information on small customer complaints and dispute resolution procedures, and other information pertinent to customers.

Our first review commenced in July 2012, and continued iteratively over the subsequent months to ensure that requirements were met and that areas of non-compliance had been addressed. A review of all retailers and distributors operating in South Australia commenced in February 2013, and was undertaken over subsequent weeks.

Following completion of our reviews we raised areas of potential non-compliance with the relevant energy businesses. When drawn to their attention, businesses were responsive and made appropriate changes to their websites to ensure the necessary information was provided.

Website reviews are a useful part of our compliance monitoring program. The process itself is unobtrusive, and the level of engagement required from energy companies is driven by the level of compliance uncovered during the process. The AER will conduct similar reviews for new entrant companies, and as remaining jurisdictions implement the Retail Law.

3.1.3 Targeted compliance review of small customer billing arrangements

One limb of our compliance monitoring activities is to conduct targeted reviews of particular obligations under the Retail Law or Rules. These reviews examine the policies, systems and procedures energy businesses have in place to monitor and ensure compliance with their statutory obligations. The reviews assist the AER and other stakeholders to explore compliance practices, and to gain a greater understanding of the requirements of the Retail Law and Rules.

During 2012–13, feedback from jurisdictional ombudsman schemes and from our Customer Consultative Group indicated ongoing consumer complaints about the billing practices of energy retailers. As a result, we have undertaken a targeted review of retailer compliance with the small customer billing provisions in the Retail Rules.[12] These provisions cover the basis for energy bills, the frequency and content of bills, undercharging and overcharging, and billing disputes and errors. There are also requirements about the content that must be included in bills.

The review covered the period from 1 July 2012 to 30 June 2013 for retailers in Tasmania and the ACT, and 1 February 2013 to 30 June 2013 for retailers in South Australia. Retailer participation in the review was voluntary, and many retailers responded to our questionnaire and enquiries.

The findings from our review will be released in the near future.

12 Set out in Part 2, Division 4 of the National Energy Retail Rules (NERR).

3.2 Investigations and enforcement activities

Where possible breaches of obligations under the Retail Law or Rules are identified through our monitoring activities, we undertake enquiries and/or an investigation to determine whether a breach has occurred, and the nature and extent of the breach.

We take a range of factors into account in deciding whether to escalate a matter for further investigation, to pursue enforcement action, or to take no further action in relation to the matter. Part 6 of our Statement of Approach explains how we determine which option, or combination of options, will be appropriate. Our objectives in pursuing a matter include:

- stopping the breach and the behaviour that constituted the breach
- correcting the damage that the breach has caused
- preventing the same behaviour from reoccurring and deterring other regulated entities from repeating it, and
- clarifying the operation of the Retail Law, Rules and Regulations.[13]

In determining an appropriate response to achieve these objectives, each case will be assessed on its merits, with regard to all relevant circumstances. In conducting this assessment the AER will consider a range of factors, including:

- the circumstances in which the breach took place
- the period over which the breach extended
- whether the breach was deliberate or avoidable if reasonable compliance practices had been followed
- whether the breach arose out of the conduct of senior management or lower level staff
- whether the regulated entity gained financially from the breach, and if so the amount of the financial gain
- the impact of the breach, and the damage or detriment suffered by customers or third parties, which may include consideration of:
  - the number of customers affected or likely to be affected, and whether the conduct affected disadvantaged or vulnerable customers
  - the nature of the impact on the affected customers (for example, physical harm to customers, a substantial detriment to quality of life, or widespread significant financial harm)
  - whether that impact is likely to be ongoing, and
  - the ability of affected customers to obtain relief without intervention by the AER.

Enforcement responses may also be informed by the regulated entity's own actions in relation to a breach, including:

- the level of cooperation with the AER (and where applicable the relevant ombudsman scheme), and in particular whether the regulated entity itself identified the breach and approached the AER voluntarily
- action taken or planned by the regulated entity to rectify the breach and avoid a reoccurrence
- whether the regulated entity has a corporate history of compliance, as evidenced, for example, by the effectiveness of its compliance policies, systems and procedures, and
- any previous unsuccessful attempts to resolve past breaches through administrative enforcement options.

Enforcement options available to the AER are summarised in Box 2 below. We aim for a proportionate response to breaches, accounting for the impact of the breach, its circumstances, and the participant's compliance programs and compliance culture. Ideally, energy businesses should voluntarily raise compliance issues and resolve them through agreed outcomes, without us needing to exercise statutory enforcement powers or seek financial penalties.

In 2012–13, we investigated over 50 matters. These investigations were prompted by information received under the exception reporting framework, or via our other compliance monitoring activities. In the majority of cases investigated we resolved any concerns without drawing on statutory enforcement powers. In each case we received commitments from the energy companies involved to address identified issues in appropriate timeframes. Some cases were however resolved via enforcement action, and we have a number of ongoing investigations.

3.2.1 Enforcement activity—life support matters

In the period covered, there have been two incidents for which we determined that statutory enforcement action was appropriate. Both involved unexpected loss of supply for customers registered with their electricity distributor as requiring life support equipment.

These matters were first reported to us by Aurora Energy. In the first case, a life support customer's premises were de-energised in error (that is, power supply was disconnected) when an officer of the distributor was

13 AER, *Statement of Approach*, p.14.

sent to de-energise adjacent premises. In the second, two registered life support customers were not given the required four days' notice of a planned interruption to supply due to errors made in preparations for the event.

Both incidents gave rise to multiple breaches of civil penalty provisions under the Retail Rules, and affected multiple customers. A single infringement notice was served for each incident. These have a fixed penalty of $20 000. Notices were only served in relation to the primary obligations to affected life support customers. The decision to serve these notices was driven by concerns that:

- processes, systems and procedures in place to ensure compliance at the time of the incidents were inadequate, and that risks could and should have been managed more effectively
- processes, systems and procedures in place to respond to the incidents once identified were lacking, so that the impact in each case could and should have been reduced
- the risk to customers affected by these incidents, not merely the impact, was not fully appreciated or understood throughout the business.

It is fortunate that neither incident resulted in harm to the affected life support customers. Breaches of these obligations carry risks to vulnerable customers, and the potential impact is severe. In addition to payment of a combined $40 000 in penalties, Aurora undertook a program of corrective measures to address our concerns. Aurora's payment of penalties in this instance is not an admission of a contravention of the Rules.

ActewAGL also reported potential breaches of the life support obligations of the Retail Rules, and also undertook to implement a program of corrective actions. Infringement notices were not issued in this case on the basis that ActewAGL had processes, systems and procedures in place to monitor compliance, and to respond to incidents once identified.

The AER's actions in these cases were publicised in a media release issued on 19 December 2012.[14]

14 Available on the AER's website at http://www.aer.gov.au/node/18953.

Box 2: Enforcement of the National Energy Retail Law & Rules

The Retail Law provides the AER with a range of possible enforcement responses to breaches of obligations under the Retail Law and Rules. We are not required to use these powers whenever a breach occurs, and the option we choose will depend on the circumstances in each case. Often issues can be resolved without the need to resort to these options, while in other cases an incident that at first appears to be non-compliant may, on further investigation, turn out not to be a breach.

Where, however, a potential breach is identified, the following options are available to the AER:

Administrative resolution

In many cases administrative resolutions, such as voluntary undertakings, revisions to internal processes or improved compliance training, may provide the best outcome. The AER is more likely to consider a matter suitable for administrative resolution where the effect of an actual or potential contravention is limited, and the energy company has taken (or agrees to take) appropriate steps to end the conduct and to remedy any harm done.

A decision by the AER to resolve a matter administratively does not remove the energy company's responsibility for the actual or potential contravention, nor does it indicate an acceptance or approval of the conduct. Rather, it represents an acknowledgement by the AER that the potential breach is relatively minor, and/or that the company has taken active steps to stop the conduct and remedy any harm done. In each case the AER will reserve its right to take statutory enforcement action if the circumstances change or the information on which the AER based its assessment is subsequently found to have been incomplete, inaccurate or misleading.

Enforceable undertakings

Under the Retail Law, the AER may accept a written undertaking from an energy company in connection with any matter in relation to which it has a function or power under the Retail Law or Retail Rules.[15]

Enforceable undertakings are given voluntarily. The AER cannot compel a regulated entity to give an enforceable undertaking, and the AER also is not required to accept an undertaking proffered by a regulated entity.

Enforceable undertakings can provide tailored solutions to address the conduct that has given rise to the breach. For example, an enforceable undertaking might include commitments to stop the behaviour that led to the breach, provide redress for parties affected by the breach, or to introduce measures to help prevent future breaches.

Where the AER considers that an enforceable undertaking has been breached, it can seek orders from the court. These include declaration of a breach or injunctions preventing further conduct. If the court finds that there has been a breach of an enforceable undertaking it can:

- order the person to comply with the undertaking
- issue an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach
- issue any orders it considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach, and
- make any other order that it considers appropriate.

Infringement notices

The Retail Law and Rules contain a number of 'civil penalty provisions'[16], and if the AER has reason to believe that a person has breached one of those provisions, it has the power to issue an infringement notice.[17] The penalty payable under an infringement notice is $4000 for a natural person or $20 000 for a body corporate.[18]

Payment of an infringement notice will result in the closure of the AER's investigation. Payment of the notice does not require the energy company to admit to a breach, or to accept liability in respect of a breach. Once the AER has issued an infringement

15 NERL, s. 288.

16 For lists of civil penalty provisions, see s. 4(1) of the NERL and schedule 1 of the National Energy Retail Regulations.

17 NERL, s. 308.

18 National Gas Law, s, 279.

notice, it cannot initiate court proceedings in relation to the act or omission that is the subject of the notice, unless it revokes the notice within a specified period, or if the person subject to the notice does not pay the penalty.

A decision not to pay the penalty under an infringement notice is likely to result in litigation. The AER can also take further action should the breach reoccur after the payment of an infringement notice.

Civil proceedings

The AER may institute proceedings in court in relation to an alleged breach of obligations under the Retail Law and Rules. On application by the AER, the court can make a range of orders including one or more of the following:

- a declaration that a person is in breach of a provision or provisions
- if the provision is a civil penalty provision, an order that the person pay a civil penalty of up to $20 000 for a natural person, or $100 000 for a body corporate for each breach (and an additional $2000 or $10 000 respectively for every day during which the breach continues)
- an order that the person cease, within a specified time, the act, activity or practice constituting the breach
- an order that the person take such action, or adopt such practice, as the court requires for remedying the breach or preventing a recurrence of the breach
- an order that the person implement a specified program for compliance with the Retail Law and Rules.[19]

If a person is engaging (or is proposing to engage) in conduct that is in breach, the AER can apply to the court for an injunction restraining the person from engaging in the conduct, or requiring the person to take some positive action in relation to the conduct or its effect.[20]

Revocation of retailer authorisation

The Retail Law empowers the AER to revoke a retailer authorisation where the AER is satisfied that:

- there has been a material failure by a retailer to meet its obligations under the energy laws, and
- there is a reasonable apprehension that the retailer will not be able to meet its obligations under the Retail Law and Rules in the future.[21]

Revoking a retailer authorisation will prohibit that retailer from selling energy in any participating jurisdiction. Under the Retail Law, a prescribed revocation process requires the AER to provide reasons for any revocation.[22] The process also provides the relevant retailer an opportunity to show cause why its authorisation should not be revoked and to make a proposal to address the AER's concerns.[23]

19 NERL, s. 291.

20 NERL, s. 291(3).

21 NERL, s. 107.

22 NERL, s.120(3).

23 NERL, s. 120(4).

3.2.2 Cooperation with the ACCC

Energy companies subject to the Retail Law and Rules also have obligations under other laws. These include obligations under the Australian Consumer Law (ACL), which governs the behaviour of Australian suppliers more generally.[24]

The ACL is administered by the Australian Competition and Consumer Commission (ACCC). The AER has a strong relationship with the ACCC, which has ensured a high level of consistency and close cooperation on energy matters since the AER was established in 2005.

The AER and ACCC continue to work closely to ensure that misconduct in the energy market is addressed. The two agencies employ the most effective means of addressing consumer harm through cooperative compliance initiatives in the first instance, and complementary enforcement action as required.

This close cooperation was evident in 2012–13 in relation to the joint AER–ACCC activity on door-to-door energy marketing.

Energy marketing activities: door-to-door selling

Throughout 2012 and 2013, the ACCC and AER undertook a campaign on door-to-door marketing by energy retailers. This campaign has focussed on compliance with obligations in the ACL regarding misleading and deceptive conduct, and unsolicited marketing practices.

The campaign commenced following a joint letter from the ACCC and the AER in 2011 which reminded retailers of their obligations and placed them on notice of the regulators' focus. In taking action the agencies have emphasised that businesses should be aware that even when they rely on agents or other third parties to perform door-to-door selling, they have strict obligations to consumers under the unsolicited selling provisions of the ACL.

The AER has contributed to the ACCC's activities in this campaign, providing knowledge and expertise of energy markets to assist the investigations of the alleged misconduct. The AER has worked directly with the ACCC to gather information from impacted customers, as well as via its network of energy market stakeholders.

In September 2012, the Federal Court ordered Neighbourhood Energy Pty Ltd and its former marketing company Australian Green Credits Pty Ltd to pay total penalties of $1 million by consent for illegal door-to-door selling practices. Neighbourhood Energy, a Victorian-based electricity retailer and a wholly owned subsidiary of Alinta Holdings, was ordered by consent to pay a penalty of $850 000. Australian Green Credits, the former door-to-door marketing contractor for Neighbourhood Energy, was ordered by consent to pay $150 000.

The Court declared that door-to-door salespeople engaged by Australian Green Credits to sell electricity on behalf of Neighbourhood Energy failed to leave the homes of two consumers upon request, in breach of the ACL. In both instances, the initial request was made by a notice that stated 'do not knock' and indicated that unsolicited door-to-door selling was unwelcome at that home.

The Court also declared that Neighbourhood Energy and Australian Green Credits engaged in misleading and deceptive conduct. Salespeople representing Neighbourhood Energy made misleading and deceptive statements to consumers, including that the salesperson was not there to sell anything, and that the consumer had been 'zoned incorrectly' and was being wrongly billed by their supplier.

In May 2013 the Federal Court ordered by consent that AGL Sales Pty Ltd and AGL South Australia Pty Ltd pay combined penalties of $1.555 million for illegal door-to-door selling practices. CPM Australia Pty Ltd, the marketing company used by the AGL companies, was also ordered to pay $200 000 for its role in the conduct.

The Court also declared that the salespeople breached the ACL because they did not clearly advise consumers that their purpose in calling on the consumer was to seek the consumer's agreement for the supply of electricity and gas, or that they would be obliged to leave immediately upon request.

In both cases corrective advertising and compliance programs were also ordered.

In March 2013 the ACCC announced that it had filed proceedings in the Federal Court against EnergyAustralia Pty Ltd (formerly TRUenergy Pty Ltd) and four marketing and sales companies engaged by Energy Australia in relation to their door-to-door selling practices.

24 Regulations to give practical effect to the Australian Consumer Law provisions contain some exemptions which may apply to some energy retailers or distributors. Transitional periods also apply to some regulations.

Continuing activities into 2013–14

In July 2013 the ACCC announced that it had accepted an enforceable undertaking from Lumo Energy Australia Pty Ltd (Lumo Energy) following an investigation into the conduct of its door to door sales agents. The ACCC's investigation was prompted by consumer complaints about the sales practices of Lumo Energy's sales agents.

In September 2013 Red Energy Pty Ltd paid four infringement notices totalling $26 400 and provided a court enforceable undertaking to the ACCC for alleged misrepresentations made by a Red Energy telemarketer. Red Energy supplies retail energy to consumers in Victoria, South Australia and New South Wales. Red Energy employees conduct telemarketing to generate sales in these states.

Other proceedings are also ongoing in relation to door-to-door marketing conduct. On 11 September 2013, the ACCC instituted proceedings against Australian Power & Gas Company (APG) in relation to alleged false and misleading conduct, breaches of the unsolicited consumer agreement provisions and one instance of unconscionable conduct. The ACCC is seeking declarations, pecuniary penalties, an order for corrective newspaper and website notices, an order for APG to establish and implement a compliance program, and costs.

On 27 September 2013 the ACCC announced that it had filed proceedings against Origin Energy Retail and Origin Energy Electricity (Origin Energy), and marketing company SalesForce, in relation to their door-to-door sales practices. The ACCC is seeking pecuniary penalties, declarations, injunctions, an order for corrective notices, an order for Origin Energy and SalesForce to establish and implement compliance programs, and costs.

3.3 Information reporting

Throughout 2012–13 we have issued a number of publications relevant to our compliance and enforcement activities. These publications help to inform and educate our key stakeholders about our activities and our expectations around compliance with the Retail Law and Rules. We may also choose to report on the outcomes of investigations where it is useful to highlight compliance issues to other regulated entities, customers and stakeholders.

3.3.1 Publications and guidance

Statement of Approach

An important document relevant to the AER's Retail Law compliance activities is the *Statement of Approach: compliance with the National Energy Retail Law, Retail Rules and Retail Regulations* (Version 1, July 2011).[25] While the Statement of Approach was published prior to the commencement of the Retail Law, it remains an important part of the AER's activities, as it sets out how we will undertake our compliance and enforcement work. This includes factors we will consider in pursuing an investigation, or when considering particular outcomes to a compliance or enforcement activity.

Compliance Procedures and Guidelines

As noted earlier, we have published the *Compliance Procedures and Guidelines: National Energy Retail Law, Retail Rules and Retail Regulations* (Version 2, June 2012).[26] The Guidelines set out the manner and form in which regulated businesses must submit specified information to the AER regarding their compliance with the Retail Law, Rules and Regulations. The Guidelines apply to both energy distributors and retailers, for both electricity and gas.

In addition to setting up the exception reporting framework described earlier, the Guidelines also describe how the AER will go about exercising its powers to audit the compliance of a regulated business. The Retail Law provides that the AER may carry out an audit, or arrange for someone else to carry out an audit, of the activities of a regulated business to assess that business's level of compliance.[27]

The Guidelines also expand upon the obligation on regulated entities to monitor their own compliance. The Retail Law states that a regulated entity must establish policies, systems and procedures to enable it to efficiently and effectively monitor its compliance with the Law, the Regulations and the Rules.[28] Those policies, systems and procedures must be established and observed in accordance with the relevant provisions of the AER's Guidelines.[29] We have specified in the Guidelines that the policies, systems and procedures must be established and observed in a manner and form consistent with

25 Available on the AER website at http://www.aer.gov.au/node/16111.

26 Available on the AER website at http://www.aer.gov.au/node/1267.

27 NERL, s. 275.

28 NERL, s. 273(1).

29 NERL, s. 273(2).

Australian Standard AS 3806: Compliance Programs (as amended from time to time).

Retail Energy Market Update: Compliance (July to December 2012)

Earlier in 2013 the AER published a *Retail Energy Market Update: Compliance*.[30] This publication reported on the AER's compliance monitoring activities, and the level of compliance by regulated businesses, in the six months following the commencement of the Retail Law in Tasmania and the ACT. It also highlighted the activities the AER intended to undertake in the remainder of the 2012–13 financial year, and in the second half of 2013. The Update therefore provided an interim report prior to the release of this full annual report.

The Update covered a six month period, and reported on a range of the AER's activities, as well as a number of compliance issues we had identified. We are considering developing more regular and/or targeted compliance updates that focus on particular issues or particular trends. For instance, there may be benefit in updates that focus on specific obligations within the Retail Law or Rules, and that highlight what we have observed to be poor practice and good practice.

Speeches and presentations

A number of speeches by AER Board members made during 2012–13 have touched on the AER's compliance and enforcement activities. These public statements by AER members are a way in which we reinforce our key messages and expectations in relation to Retail Law compliance.

AER Chairman Andrew Reeves discussed the AER's Retail Law compliance activities in a speech to the National Consumer Roundtable on Energy in July 2013. Mr Reeves highlighted that the AER takes the life support obligations very seriously; the potential risks to life support customers are high, and the AER expects businesses to put in place all appropriate measures and take all appropriate steps to comply with these obligations.[31]

Also in July 2013, Mr Reeves addressed the South Australian Council of Social Services. Mr Reeves discussed the AER's approach to increasing consumer confidence in the retail energy market, highlighting the importance of Energy Made Easy and also promoting a compliance culture within the industry. Clear, simple and correct information on the Energy Made Easy website helps build consumer confidence. Mr Reeves also stated that the AER prefers for compliance matters to be voluntarily raised by industry and resolved through agreed outcomes, however, targeted and timely enforcement action may be necessary and appropriate in certain circumstances.

3.3.2 Correspondence and liaison

Liaison with retailers and distributors

The AER responded to a number of enquiries from regulated businesses about their obligations under the Retail Law, Rules and Regulations.

The AER does not provide legal advice to regulated businesses on whether or not their activities are compliant with the relevant obligations. Each business is expected to obtain its own legal advice to ensure it manages its own risks. Further, as required by the Retail Law itself, a regulated entity must establish 'policies, systems and procedures to enable it to efficiently and effectively monitor its compliance' with the Retail Law, Rules and Regulations.[32]

The AER is able to provide general guidance on matters that arise, or to direct businesses to the applicable provisions within the legislative framework. However, this in no way constitutes approval or sign-off by the AER of a particular activity.[33]

Preparation for commencement of the Retail Law

In preparation for the commencement of the Retail Law and Rules in participating jurisdictions, the AER undertook significant preparation work with soon-to-be regulated businesses. For example, prior to the commencement of the Retail Law in New South Wales on 1 July 2013, we engaged with 16 retailers to assist them with their preparations for using the AER's Energy Made Easy price comparator website. This included training three retailers specifically for the New South Wales

30 Available on our website at http://www.aer.gov.au/node/19800.

31 The full text of the speech is available on the AER website at http://www.aer.gov.au/node/21297.

32 NERL, s 273(1).

33 This contrasts to a situation where the AER has a defined role conferred on it by the Retail Law, Rules or Regulations.

launch. With the commencement of the Retail Law in New South Wales, more than 900 energy offers were published on Energy Made Energy.

Authorisation and exemption of energy sellers

The Retail Law requires that anyone selling gas or electricity to persons for premises to be authorised, or exempt from the requirement to be authorised. The AER is responsible for authorising or exempting anyone in these circumstances.

Authorised retailers currently operating in the National Energy Market have historically operated under a 'typical' energy retailer business model. That is, the retailer is the sole provider of a customer's energy (gas or electricity) and energy is sold as an essential service. Once a business is authorised, it is bound by a range of obligations under the Retail Law.

Since the Retail Law commenced we have been approached by a range of businesses offering new and innovative energy products that involve the sale of energy. Generally, these new energy sellers do not sell energy under a 'typical' energy retailer model and are also different from typical exempt sellers.

In response to these approaches the AER developed and released a discussion paper in October 2013 on the regulation of alternative sellers under the Retail Law. The AER is seeking input from stakeholders on an approach to regulating alternative energy sellers, including the factors that should determine the approach and the weight they should be given. We are also interested in understanding whether other alternative energy selling models exist, and whether stakeholders consider that these sellers raise implications under other consumer protection frameworks.

Other stakeholders

The AER also meets frequently with other parties with an interest in the Retail Law and Rules. These include:

- consumers and consumer representatives
- ombudsman schemes
- organisations representing vulnerable consumers, and
- jurisdictional regulators
- other energy regulatory bodies, such as the Australian Energy Market Operator (AEMO).

Our liaison with these stakeholders provides valuable insight into the issues customers are facing in the retail energy market. Information obtained through these channels also helps uncover trends or systemic issues.

4 Issues arising in 2012–13

This section of the report discusses our observations on compliance issues that have arisen during the 12 month period up to 30 June 2013. Our observations come from the activities we have undertaken throughout the year, and information we have acquired in the course of our work. This includes information obtained via our exception reporting framework and other compliance monitoring and investigative activities.

Our observations are qualified in that the Retail Law and Rules have been progressively implemented by jurisdictions during the 12 months to 30 June 2013. The legislation commenced on 1 July 2012 in the Australian Capital Territory and Tasmania (where it applies for electricity only), and on 1 February 2013 in South Australia. New South Wales adopted the legislation on 1 July 2013, while Victoria and Queensland are expected to adopt it in the future. Much of the activity we have observed for 2012–13 has therefore occurred in smaller jurisdictions and may not be representative of overall conduct across all energy companies throughout Australia. At this point in time it is therefore difficult to provide a 'national' picture of Retail Law compliance.

The year from 1 July 2012 to 30 June 2013 is also the first year in which the Retail Law and Rules have been in operation. This, coupled with the progressive rollout, poses challenges in terms of benchmarking an appropriate level of compliance. While in some areas levels of compliance appear to have been good, with retailers and distributors willing to address concerns when raised by the AER, in other areas there may be more cause for concern and a need for greater attention by businesses and by the AER. In that regard, the AER's observations on compliance during 2012–13 are informing refinements to how the AER undertakes its compliance and enforcement activities in 2013–14. Our ongoing activities are discussed further in section 5 of this Report.

In summary, we have observed recurring issues in relation to the life support obligations in the Retail Rules, and the provisions around disconnection of customers and the management of planned interruptions to the energy supply. Amongst retailers specifically, issues have centred around the quality of information available to consumers, with billing practices an area of particular concern.

Issues have largely been caused by human or system errors, and energy companies have been cooperative in remedying issues when raised by the AER.

It is important to note that for each issue identified, the AER has undertaken work to follow up with the energy companies involved. This includes correspondence and meetings, or more formal investigations, to address the issues that have arisen. We report here aggregated information on recurring issues that we have observed, and where appropriate, the causes of those issues and the steps taken to address them. As noted, the issues we have observed during 2012–13 are also informing how we undertake our current and continuing compliance and enforcement activities.

As the Retail Law is implemented in additional jurisdictions, and as the AER has a greater time period over which to monitor compliance, our reporting on levels of compliance may change. We expect in future to be in a position to offer more definitive statements on levels of compliance, and on areas of focus for the AER. These matters are discussed further in section 5 below.

4.1 Obligations to life support customers

Distributors and retailers must meet strict obligations in relation to customers with life support equipment at their premises. For distributors, key obligations are set out in rules 125 and 126 of the Retail Rules; for retailers, key obligations are in rule 124. These obligations are summarised in the box below.

For the 12 months to 30 June 2013, we have seen seven reported notifications of potential breaches of these obligations by electricity distributors, including the unauthorised de-energisation of the premises of a registered life support customer. On six separate occasions life support customers were not notified of planned interruptions to supply at their premises. We have also been notified of discrepancies between retailer and distributor life support registers, and of failures by distributors to provide required information to life support customers at the time of registration.

Incidents reported in 2012–13 have involved system or process errors that have led to a failure to provide a life support customer with the requisite notice of a planned interruption. Some incidents have also involved human error, where staff of the regulated businesses have failed to follow proper procedures, or have taken mistaken actions in the performance of their duties. While mistakes can happen, it is important to stress that the obligations in the Rules do not distinguish between a breach that is wilful or accidental; a breach, even if inadvertent, will still be a breach.

The potential risks to life support customers from non-compliance with these obligations are high, and businesses should put in place all appropriate measures and take all appropriate steps to remove the likelihood of a breach. The goal should be to have zero incidents that could amount to a breach of the life support obligations.

In 2012 the AER took formal enforcement action in relation to potential breaches of these provisions by Aurora Energy in Tasmania and ActewAGL in the Australian Capital Territory. This action is described above in section 3.

Box 3: Obligations in relation to life support customers

Distributors and retailers must maintain a register of premises that have life support equipment. Registration requires confirmation from a registered medical practitioner that a person residing at the customer's premises requires life support equipment of the kind specified in the Retail Rules.[34] Customers can register through their retailer or their distributor. Where registration is first received by a retailer, the retailer must promptly advise the distributor.[35] Distributors must maintain life support registers and keep them up to date.[36]

Customers registering their dependence on life support equipment must be given information to assist them if they unexpectedly lose supply. This information must be provided to the customer when they register. Customers registering with their retailer must be given an emergency contact number for their distributor, by their retailer. This is particularly important if retailers cannot be sure that the customer will be registered by their distributor on the same day.

When a distributor registers a customer—on advice from a retailer or direct advice from the customer—it must provide:

- General advice that there may be a planned or unplanned interruption to supply at the address.
- Information to assist the customer to prepare a plan of action in the case of an unplanned interruption.
- An emergency contact number for the distributor (the charge for which is no more than the cost of a local call).

Retailers and distributors must not de-energise, or arrange de-energisation of, premises registered as having life support equipment while the person requiring that equipment continues to reside there. The only exception to this is where the customer has requested de-energisation.

The Rules also recognise that life support customers may be among premises affected by a planned or unplanned interruption. The Retail Rules explicitly require distributors to provide written notice of planned interruptions to those customers four business days prior to the interruption.

34 NERR, r. 124(1) and 125(1).

35 NERR, r. 124 (1)(c).

36 NERR, r. 126.

4.2 De-energisation of small customers ('wrongful disconnections')

The Retail Rules include strict controls around the de-energisation—or disconnection—of small customers. Retailers must not arrange de-energisation of a small customer's premises other than in accordance with Part 6, Division 2 of the Retail Rules. Distributors must not de-energise a small customer's premises other than in accordance with Part 6, Division 3. Each Division specifies:

- the circumstances in which small customer premises can be de-energised, and steps that must be followed and conditions met before this can occur, and
- particular situations in which de-energisation of small customer premises is prohibited, even where the circumstances above exist.

For the reporting period, distributors reported a total of 15 cases where a customer may have been de-energised other than in accordance with the legal requirements; retailers reported 30 cases. Between retailer and distributor wrongful disconnections, 81 customers were reported as being affected.[37]

The primary driver of these incidents has been human error and failure to follow proper internal procedures when recording and actioning customer requests for de-energisation. Incidents have occurred when conflicting requests from 'move-in' and 'move-out' customers have not been identified and reconciled, or where service orders relating to blocks of flats or units have been processed and procedures have been carried out for the wrong address. Incidents have also occurred due to misread service orders, failures to check metering identifiers on service orders against those at the site, and misidentification of customer installations. Less common drivers include faults in IT systems and complications arising from mislabelled or unlabelled customer installations.

The AER acknowledges that disconnections frequently occur, and that the vast majority are carried out in accordance with the legal requirements. Nonetheless, given the high frequency, there is a higher likelihood of a wrongful disconnection. While the number of wrongful disconnections may be quantitatively small, the potential impact on affected customers in a particular case may be significant. Furthermore, the same drivers identified as contributing to de-energisation of small customers generally contributed to the de-energisation of the premises of a registered life support customer in August 2012.

Putting in place systems and processes to ensure that wrongful disconnections do not occur should be the starting point. However, where a wrongful disconnection does occur, we have observed that businesses do take steps to fix the problem. Across different distributors we have observed the following practices:

- prompt rectification of the situation once the distributor becomes aware of the disconnection, including prompt reconnection of the customer's supply
- a waiver of any fees or charges associated with disconnection or reconnection of the customer
- an offer of ex gratia payments to the customer to cover any inconvenience
- an easily accessible compensation scheme for the customer to claim any additional costs, such as to compensate for spoiled food
- a review by the distributor of its systems and process to identify errors that may have led to the wrongful disconnection, and the implementation of necessary changes to address those errors, and
- counselling of the staff involved to highlight the importance of Retail Law compliance and of following appropriate processes.

While avoiding wrongful disconnection should be the goal, we note that businesses are proactive in making amends when mistakes occur.

4.3 Management of planned interruptions

In certain circumstances distributors have the right to temporarily interrupt the supply of energy to customer premises, including for planned and unplanned interruptions. There are however strict requirements distributors must follow, including ensuring that customers are fully informed of the nature and extent of any interruption.

Planned interruptions are permitted for maintenance, repair or expansion of the transmission, distribution or metering systems. Under rule 90 of the Retail Rules, a distributor must notify each affected customer of a planned interruption at least four business days before the date of interruption. The notification must contain the expected date, time and duration of the interruption. It must also include a 24 hour telephone

37 In some cases, a wrongful disconnection at the pole led to multiple customers being disconnected from the one incident.

number for enquiries and a statement that any enquiries regarding the planned interruption are to be directed to the distributor.

Where unplanned interruptions occur[38], equivalent information must be made available through a 24 hour phone number within 30 minutes of a distributor being advised of the interruption, or as soon as practicable thereafter.

For the 12 month period, businesses have identified approximately 72 instances where the requisite notice was not given to customers of a planned interruption. In some cases no notice was provided of the interruption. Causes for this included human error and failure to follow internal procedures for undertaking a planned interruption. On occasion internal records were incorrect and did not accurately identify customers to be impacted by the planned outage, hence those customers were not notified. These included situations where internal records inaccurately identified customers connected (or not connected) to a particular substation. In other cases, notification was given to customers, but not the four days required under the Rules. These included instances where the time scheduled for the planned interruption was altered, such that customers were given less than four days' notification.

In the majority of cases the impact of these incidents was limited to a very small number of customers. Those customers experienced a power outage without notification. Often the outage was of brief duration and the businesses involved made compensation payments to the customers. In some instances the impact was wider-spread, affecting dozens or even hundreds of customers in a particular area.

As with wrongful disconnections, we also observed that businesses do take steps to mitigate the consequences and to prevent the reoccurrence of a poorly managed interruption. Prompt rectification of the interruption, or effective customer service during the interruption to inform consumers, have both been seen. Payment of compensation or other ex gratia sums also mitigates adverse customer impacts. While again the aim should be to have systems and processes in place to ensure that planned interruptions are managed appropriately, and that customers are given the necessary notifications, where problems occur, review and continuous improvement can reduce and potentially remove the likelihood of further incidents.

38 Of the nature described in Part 4, Division 6 of the NERR.

4.4 Energy marketing activities

The Retail Rules require every energy retailer to create and maintain a 'no contact list'.[39] That is, a list of small customers with whom the retailer must not make contact for the purposes of energy marketing. The list precludes the retailer from energy marketing in person, at a person's premises, or marketing by mail. It does not apply to telemarketing calls (as customers can sign up to the national 'do not call register'), or to e-marketing activities (which have a separate code of conduct regulated by the Australian Communications and Media Authority). Retailers are required to publish details of their no contact lists—including how a customer can be put on the list—on their website. Publishing details on the website ensures that customers can find out about the list and how to register.

During our website reviews, we found that a number of retailers had not provided information about the 'no contact list'. That is, there was no indication of what the list was, or how a customer could be placed on the list. All retailers corrected the issue once they were made aware of it by the AER. In some cases, retailers had published the information, but it was not readily accessible or apparent. In these instances we recommended that the retailer move the link to a more prominent position on their website.

Under the exception reporting framework, one business reported a potential breach of the marketing rules involving an employee marketing at premises where a 'do not knock' sticker was displayed. The business reported that it terminated the employment of that employee upon learning of the incident.

Some businesses also reported instances where they may not have acquired 'explicit informed consent' from customers prior to signing contracts. The Retail Law prescribes circumstances where a retailer must obtain the explicit informed consent of a customer, which includes the transfer of the customer from one retailer to another.[40] The Retail Law also provides that where explicit informed consent is not obtained, any transaction between the retailer and a small customer is void.[41]

More broadly, energy marketing activities must also be compliant with the Australian Consumer Law (the ACL). The ACL sets out a range of consumer protections applicable to businesses operating in the Australian economy. The ACL prohibits businesses

39 NERR, r. 65.

40 NERL, s. 38.

41 NERL, s. 41(1).

engaging in conduct that is misleading or deceptive, or unconscionable. It also includes rules on 'unsolicited consumer agreements', which apply when a salesperson approaches consumers at their home, over the phone or in a public place. Throughout 2012–13, the ACCC and the AER have undertaken a campaign targeting door-to-door sales practices of energy companies. The outcomes of this project are described above in section 3.

4.5 Information available to consumers

The Retail Law and Rules include a range of provisions that oblige regulated business to publish or provide information to consumers. In the 12 months to 30 June 2013, we conducted reviews of the websites of distributors and retailers to assess the level of compliance with the various publication requirements. Businesses also reported potential breaches to us under the exception reporting framework. Details of these matters (including the particular obligations) are discussed below.

Overall, we observed that distributors made the necessary information available on their websites and in the required form. Amongst retailers, the results were mixed. Some retailers failed to publish all the documents required by the Retail Law and Rules, including energy price factsheets, contracts and standard complaint and dispute resolution procedures. We also observed issues with the quality control of documents and information published. These issues were however rectified when raised with the businesses concerned.

More specifically, a number of issues were observed in relation to small customer billing. We will be publishing the findings of our review of small customers billing arrangements in the future. We are also currently undertaking further follow up activities in relation to customer billing.

4.5.1 Energy price factsheets

The Retail Law requires standing and market offers (the fees and charges payable under standard and market retail contracts respectively) to be presented in accordance with the AER *Retail Pricing Information Guideline* (Pricing Guideline).[42] The Pricing Guideline requires the development of energy price factsheets, with prescribed content and format, for all offers.[43] Energy Made Easy is the AER's price comparator website, and it allows customers to generate an energy price factsheet for a selected offer. Retailers can also use Energy Made Easy to develop their factsheets.[44]

Our website reviews found high levels of non-compliance by retailers in relation to energy price factsheets. Errors ranged from retailers failing to produce and publish energy price factsheets for their offers at all, failing to name the documents as energy price factsheets, or failing to satisfy the information and formatting requirements specified in the Pricing Guideline. Additionally, the Retail Law requires that standing and market offer prices be published prominently on the retailer's website.[45] In some cases, we had difficulty locating this information on retailer websites, as it was not published prominently. We followed up with retailers regarding their practices, giving individual feedback to individual retailers. In response retailers made the necessary revisions to their factsheets.

The AER continues to work with retailers in relation to the production and publication of energy price factsheets. Retailers are able to generate compliant energy price factsheets for their generally available offers through Energy Made Easy. AER staff are also available to review draft factsheets and provide feedback prior to their publication where retailers are unsure of their obligations.

42 NERL, s. 24(1) and s. 37(1).

43 AER, *Retail Pricing Information Guideline*, section 2.1.

44 This facility is only available for offers published on Energy Made Easy at www.energymadeeasy.gov.au.

45 NERL, s. 24(2) and s. 37(2).

Box 4: Energy price factsheets

The manner in which energy price factsheets are made available to customers differs for standing offers, and generally and non-generally available market offers. For a generally available offer, the retailer must publish an energy price factsheet on its website and submit information on the offer to the AER for publication on Energy Made Easy. For a non-generally available market offer, the retailer is not required to publish an energy price factsheet on its website or send information on the offer to the AER. However, the retailer must develop an energy price factsheet for the non-generally available market offer to provide to customers or the AER on request. Standing offer prices must be published in an energy price factsheet on a retailer's website, without exception, even if the standing offer price is a non-generally available offer. We have seen several examples of retailers who are not actively marketing in a jurisdiction, but retain customers there, and therefore are required to publish a standing offer. If retailers are concerned about publishing an energy price factsheet for a standing offer that is non-generally available, the retailer is not prevented from presenting that offer with appropriate caveats as to the offer's restricted availability.

Energy price factsheets are there to assist small customers to consider and compare the standing and market offer prices available and make an informed choice between them. Non-compliant factsheets hinder this objective. In addition to breaching price disclosure requirements, they also put retailers at risk of breaching their marketing obligations and requirements for explicit informed consent if they are relied upon in sales channels.

4.5.2 Standard and market retail offers and contracts

Under the Retail Law, authorised retailers must make a standing offer to retail customers for whom it is the 'designated retailer'.[46] A customer may request a standing offer by phone or in writing, must provide their name and acceptable identification, customer contact details for billing, and must ensure safe and unhindered access to the meter. If the retailer is not the designated retailer and elects not to offer the customer a contract, the retailer must refer the customer to their distributor, and inform the customer that the distributor will advise them which retailer has the obligation to make a standing offer to that customer.

Two potential breaches of the obligation to make a standard offer were reported under the exception reporting framework. In each case the conduct was inadvertent, had little impact on customers and was remedied by the businesses concerned.

Standard retail contracts

The Retail Law allows for only two types of contract for customer retail services: standard retail contracts and market retail contracts.[47] Retailers are not permitted to supply customer retail services to small customers under any other kind of contract or arrangement.[48]

All retailers are required to adopt a form of standard retail contract and publish it on their website. The contract must be consistent with the model terms and conditions set out in Schedule 1 of the Retail Rules. The model terms and conditions must be adopted with no alterations, other than required alterations (which *must* be made) and permitted alterations (which *can* be made at the discretion of the retailer). Required alterations are alterations required by the Retail Rules relating to specific jurisdictions, or alterations specified or referred to in the Retail Rules (including references within the model terms and conditions themselves).[49] Permitted alterations include those specifying the retailer's identity and contact details; minor alterations that do not change the substantive effect of the model terms and conditions, and alterations specified or referred to in the Retail Rules.[50]

Some issues were identified in this area during our website reviews. Most retailers we reviewed had made the required alterations to their standard retail contracts. Where issues were identified, they arose from retailers' preferences to adopt a single form of standard retail contract that could be used in all Retail Law jurisdictions. This approach is acceptable where it does not compromise the clarity of the contract or the intent of the required alteration.

Some retailers sought to change the protections under standard retail contracts in a way that altered their substantive effect. This included via the addition to a standard retail contract of a schedule that sought to dilute protections attached to standing offer prices. Specifically, where customers opted for a green energy plan, this schedule sought to replace the restrictions applying to variation of prices under a standard retail contract with those applicable to a market retail contract. The AER followed up this issue with the retailer concerned, and the retailer made appropriate changes to the contract.

Retailers are not prevented from including green options in a standard retail contract, or to the application of additional or different charges for these options. If, however, such options are to be included in a standard retail contract the provisions of the Retail Law and Rules governing disclosure and variation of standing offer prices must be applied to all relevant charges. The Retail Law ensures that the model terms and conditions will prevail over those in the schedule should the relevant retailer seek to enforce them against any customer who is party to a contract that included the schedule.

Market retail contracts

The Retail Law and Rules prescribe minimum requirements for market retail contracts. Retailers must ensure a market retail contract is consistent with the minimum requirements, but can also provide a higher level of service.[51] The protections provided by the Law and Rules apply even if not expressed in the contract.

Our website reviews indicated that not all retailers included the minimum requirements in the terms and conditions of their market retail contracts. A small number of retailers had incorporated most of those requirements, though many had omitted a number of the requirements. There was also an increase in retailers offering energy services with other goods and services in the one contract. The complexity of the resultant terms and conditions could be difficult for customers to understand,

46 NERL, s. 22(1).

47 NERL, s. 20(1).

48 NERL, s. 20(2).

49 NERL, s. 25(5).

50 NERL, s. 25(4).

51 NERL, s. 34(2).

and at times did not accurately reflect the minimum protections applicable to the energy service.

In discussing our approach to market retail contracts, some retailers have been more open to including the minimum terms and conditions for market retail contracts within the contract than others. Some retailers have decided to review their contracts as part of their preparations for the New South Wales implementation of the Retail Law. Retailers who have proactively changed their contracts to better reflect the minimum terms and conditions intended to roll out their new market contracts with NSW implementation.

4.5.3 Billing

The Retail Rules set out requirements retailers must meet in relation to small customer billing.[52] These requirements cover the basis for calculating bills, the frequency and content of bills, undercharging and overcharging, and billing disputes and errors. Bills are an important source of information for consumers about their energy products, and managing energy bills is an important part of a household budget. Non-compliance by retailers with the legal requirements around billing also has the potential to impact large numbers of people.

Retailers reported a number of potential breaches of the billing provisions for the 2012–13 year. The main issues retailers experienced were with ensuring a meter reading is taken at least once every 12 months, ensuring that bills were issued on time, and ensuring that bills include the right content.

The Rules require that energy retailers ensure that customer meters are read at least once every 12 months, and that actual readings are carried out as frequently as required to prepare bills. Retailers have reported various reasons for customers not having had their meters read in over 12 months. Some of the reasons included access to the meter and failure by the meter provider to supply the meter read data.

Delays in bills being provided to consumers was observed on a number of occasions. The Retail Rules state that energy retailers must issue a bill to a small customer at least once every three months for standard retail contracts. For market retail contracts, the billing cycle is agreed to within the contract. In some cases a single system error caused thousands of customers delayed bills, and in other cases, there were varied reasons for the delays.

The Retail Rules also require energy retailers to include specific details on bills to small customers. There are approximately 30 items that must be included on bills, including the meter identifier, billing period, tariffs and charges, average daily consumption, and consumption benchmarks. The main issues observed with bill contents were the absence of bill benchmarks, as well as incorrect or missing 24 hour emergency/fault phone numbers.

Feedback from jurisdictional ombudsman schemes and from our Customer Consultative Group indicated ongoing consumer complaints about billing practices, and as a result, we have undertaken a targeted review of retailer compliance with the small customer billing provisions in the Retail Rules. The findings from our review are due to be released in the near future. We are also undertaking follow up actions in light of the findings from our billing review and from the exception reporting.

4.6 Specific consumer protections

The Retail Law and Rules include a number of specific protections for energy consumers. These include obligations on businesses in relation to customers in financial hardship or in relation to the disconnection of customers for non-payment of bills. We observed isolated incidents of non-compliance with some of these requirements, though overall levels of compliance were good.

4.6.1 Standard complaints and dispute resolution procedures

The Retail Law requires retailers and distributors to develop, make and publish standard complaints and dispute resolution procedures. The standard complaint and dispute resolution procedures must be substantially consistent with the Australian Standard AS ISO 10002–2006 and must be reviewed regularly to keep them up to date.[53] The procedures must also be published on retailers and distributors' website. Retailers face an additional requirement to publish a summary of the rights, entitlements and obligations of small customers, including the dispute resolution process and the contact details of the relevant energy ombudsman.

During our website reviews we found that distributors had complied with this requirement.

The results for retailers were mixed. Most retailers published at least some of the required information,

52 Division 4 of Part 2 of the NERR.

53 NERL, s 81.

while others needed to publish additional material. Most retailers published summary information about how customers may make a complaint, though not all included the standard complaints and dispute resolution procedures for customer complaints. Where the procedures were published, some retailers provided more detail than others. One retailer reported a failure to publish a complaints management policy on its website for several weeks following commencement of the Retail Law in its jurisdiction, but it did however make this information available via its call centre. The AER raised these issues with the business concerned, and those businesses either amended existing procedures or drafted and published new ones to satisfy the requirements.

4.6.2 Customer hardship policies

The Retail Law requires retailers to develop and submit a customer hardship policy to the AER for approval within three months of being granted a national retailer authorisation. Once approved, the retailer must publish the policy on its website, and maintain and implement the policy.[54]

The AER developed guidance to assist retailers in developing their policies, which is available on our website.[55] The guidance sets out what must be included in a policy to meet the minimum requirements of the Retail Law,[56] and what is required to achieve the objectives of a customer hardship policy (that objective being 'to identify residential customers experiencing payment difficulties due to hardship and to assist those customers to better manage their energy bills on an ongoing basis.')[57]

Some retailers included internal processes and procedures supporting the implementation of the policy within the customer hardship policy itself. Others developed a policy and documented those processes and procedures separately. Some retailers also developed a shorter, customer-friendly version of their customer hardship policy for the purposes of publication. The full version of the policy is then made available upon request by a customer seeking more information.

If a retailer wants to publish a consumer friendly version of the customer hardship policy, the consumer friendly version must still reflect the minimum requirements for customer hardship policies set out in the Retail Law, and must not be inconsistent with the approved policy. To date, we have seen one instance where a retailer's abridged policy did not accurately mirror the terms of the full customer hardship policy approved by the AER. The matter was resolved quickly once we raised the issue with the retailer.

As noted in the following section of this report, the AER will be conducting a review of the administration and implementation of retailers' hardship policies in 2014.

54 NERL, s. 43(2).

55 AER, *Guidance on AER approval of customer hardship policies*, May 2011, available at http://www.aer.gov.au/node/6768

56 NERL, s. 44.

57 NERL, s. 43(1).

5 Upcoming activities

5.1 Continuing activities

For 2013–14, we will continue with our compliance and enforcement activities as outlined in section 3 above. That is, compliance monitoring, investigation and enforcement actions, and information reporting. Our current activities also include follow up investigations on issues that have been identified in this report, and the finalisation and release of our review of small customer billing arrangements. It is likely that we will also undertake further reviews of retailer and distributor websites in the future.

The year from 1 July 2012 to 30 June 2013 was the first year in which the Retail Law and Rules were in operation. In undertaking our activities during the year, we have gained experience with the administration of the Retail Law and Rules, and a greater understanding of the areas of the Law and Rules that require more targeted attention. This includes areas where compliance issues are more pressing.

This experience is informing refinements to how we will undertake our compliance and enforcement activities in 2013–14 and beyond. We propose to trial alternative reporting arrangements under the exception reporting framework; develop a statement of priorities for our enforcement and compliance activities; and publish more regular bulletins on particular compliance issues. We have started work on these matters and we will engage with our stakeholders as we further develop our approaches.

5.2 Hardship review

More specifically, we intend to conduct a review of the implementation and administration of retailer hardship policies. The purpose of a retailer's customer hardship policy is prescribed in the Retail Law—to identify customers experiencing payment difficulties due to hardship and to assist those customers to better manage their energy bills on an ongoing basis. The AER has a role in approving retailers' hardship policies and retailers are then obliged to implement and maintain their policies.

Concerns have been raised with us regarding how these policies operate in practice and the ability of customers to access hardship assistance. We have identified this as an area of focus and intend to undertake a review into retailers' hardship policies and practices. We will be looking to address any compliance issues identified, as well as to recognise examples of good practice and encourage their adoption across the industry.

We plan to commence this work in the near future, and the bulk of it will occur in 2014.

5.3 Review of guidelines

The AER has published a number of guidelines outlining our approach to the administration of different aspects of the Retail Law and Rules. In some instances regulated businesses must comply with the guidelines as if they were part of the Law or Rules.

We are planning reviews of these guidelines over the coming year, in order to refine our approach in light of the experience to date with the Retail Law and Rules. These reviews will include appropriate consultation with affected stakeholders.

5.4 Alternative energy sellers

As flagged earlier in this report, the Retail Law requires that anyone selling gas or electricity to persons for premises to be authorised, or exempt from the requirement to be authorised. The AER is responsible for authorising or exempting anyone in these circumstances.

Authorised retailers currently operating in the National Energy Market have historically operated under a 'typical' energy retailer business model. That is, the retailer is the sole provider of a customer's energy (gas or electricity) and energy is sold as an essential service. Once a business is authorised, it is bound by a range of obligations under the Retail Law.

Since the Retail Law commenced we have been approached by a range of businesses offering new and innovative energy products that involve the sale of energy. Generally, these new energy sellers do not sell energy under a 'typical' energy retailer model and are also different from typical exempt sellers.

In response to these approaches the AER developed and released a discussion paper in October 2013 on the

regulation of alternative sellers under the Retail Law.[58] The paper discusses several emerging business models, including solar power purchase agreements, which differ from the traditional energy retailing model. The paper identifies high level principles for the regulation of these businesses and proposes an approach to determining whether alternative energy sellers need a retailer authorisation or a retail exemption.

58 Available on the AER website at: http://www.aer.gov.au/node/22190.

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Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

Inquiries about the currency of this document should be addressed to:

Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

Tel: (03) 9290 1444
Fax: (03) 9290 1457
Email: AERInquiry@aer.gov.au

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